LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 27 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 581

BERNARD D. GROSSMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

RALPH N. STRAYHORN
E. C. BRYSON, JR.
Newsom, Graham, Strayhorn & Hedrick
Box 2088, Durham, North Carolina

ROY G. HALL, JR.
Hatfield, Allman & Hall
Box 593, Winston-Salem, North Carolina
Attorneys for Petitioner, Bernard D. Grossman

INDEX

	Page
Citations to Opinion Below	1
Jurisdictional Grounds	2
Questions Presented	2
Constitutional Provisions, Statutes Involved	3
Statement of Case	3
Reasons for Granting the Writ	8
Conclusion	20
Appendix A—Opinion and Orders	1a
Opinion of the United States Court of Appeals for the Fourth Circuit	1a
Order of the United States Court of Appeals for the Fourth Circuit denying Petition for Re-Hearing	9a
Order of the United States Court of Appeals for the Fourth Circuit staying the mandate	10a
Appendix B—Text of Constitutional Provisions and Statutes Involved	1b
Constitutional Provisions	1b
Statutes	1b-3b

Cases Cited

Commonwealth v. *Hayes*, 311 Mass. 21, 40 N.E. 2d 27 (1942)	15
Direction der Disconto-Gesellschaft v. *United States Steel Corp.*, 267 U.S. 22, 45 Sup. Ct. 207, 69 L. Ed. 495 (1925)	18
Fidelity Trust Co. v. *Newark Milk & Cream Co.*, 89 N. J. Eq. 224, 108 A. 54 (1918)	19
Howard v. *United States*, 345 F. 2d 126 (1 Cir., 1965) cert. denied 382 U.S. 838 (1965)	14
Krogmann v. *United States*, 225 F. 2d 220 (6 Cir., 1955)	20
Land v. *United States*, 177 F. 2d 346 (4 Cir., 1949)	17

Cases—Continued

	Page
Moore v. *United States*, 347 F. 2d 942 (9 Cir., 1965)	12
Morisette v. *United States*, 342 U.S. 246, 72 Sup. Ct. 240, 96 L. Ed. 288 (1952)	13
Manna v. *Pirozzi*, 44 N. J. Super 227, 130 A. 2d 55 (1957)	19
NLRB v. *Columbian Enamelling & Stamping Co.*, 306 U.S. 292, 59 Sup. Ct. 501, 83 L. Ed. 660 (1939)	15
Parker v. *Colonial Bldg. & Loan Ass'n.*, 111 N.J. Eq. 49, 161 A. 353 (1932)	19
Stilson v. *United States*, 250 U.S. 583, 40 Sup. Ct. 28, 63 L. Ed. 1154 (1919)	15
Thompson v. *City of Louisville*, 362 U.S. 199, 80 Sup. Ct. 624, 4 L. Ed. 2d 1020 (1960)	15
United States v. *Acme Process Equipment Co.*, 385 U.S. 138, 87 Sup. Ct. 350, 17 L. Ed. 2d 249 (1966)	8
United States v. *Glaze*, 313 F. 2d 757 (2 Cir., 1963)	17
United States v. *United States Gypsum Co.*, 67 F. Supp. 397 (1946)	15
United States v. *Haskins*, 345 F. 2d 111 (6 Cir., 1965)	17

CONSTITUTIONAL PROVISIONS CITED

United States Constitution, Article III, § 2	3, 18
United States Constitution, Amendment VI	3, 18

STATUTES

28 U.S.C. § 1254(1)	2
41 U.S.C. § 51	2, 3, 4, 5, 7, 8, 9, 11, 12, 13, 14, 16
41 U.S.C. § 52	3
41 U.S.C. § 53	3, 16
41 U.S.C. § 54	2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 21
Rule 18, Federal Rules of Criminal Procedure	3
N.Y. Personal Property Law, § 162 (McKinney 1962)	18
Uniform Stock Transfer Law, N. J. S. A. 14:8-23, etc.	18, 19

MISCELLANEOUS

	Page
12 Am. Jur. 2d Bribery § 7	15
16 Am. Jur. 2d Conflict of Laws § 35	18
21 Am. Jur. 2d Criminal Law § 88	13
27 Am. Jur. Indictments and Information § 112	17
Annot., 131 A.L.R. 1942 (1941)	19
Comptroller General of the United States, Annual Report, fiscal 1967	9
Congressional Quarterly, May 24, 1968	10
H. R. Rep. No. 212, 79th Cong., 1st Sess. (1945)	9
H. R. Rep. No. 1880, 86th Cong., 2d Sess. (1960)	9, 11
Sales Management, 99:40, Sept. 10, 1967	10
Title 5 C.F.R. § 735.202	11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

BERNARD D. GROSSMAN, *Petitioner,*

against

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes Now petitioner, Bernard D. Grossman, by and through counsel, and prays this Honorable Court to issue writ of *certiorari* to review the judgment and order of the United States Court of Appeals for the Fourth Circuit, and in support hereof, respectfully shows unto the Court the following:

Opinion Below

The opinion of the United States Court of Appeals for the Fourth Circuit by Winter, J., in *United States* v. *Grossman* was filed July 18, 1968, and is reproduced in the appendix to this petition. (App. A, pp. 1a-8a). Judgment was entered the same day. (App. A, pp. 1a-8a). The opin-

ion has not been officially reported as of the date of filing this petition.

Jurisdictional Grounds

The judgment here sought to be reviewed was entered by the court of appeals on July 18, 1968.

Petition for rehearing was filed with the court of appeals on August 1, 1968, and rehearing was denied on August 30, 1968. (App. A, p. 9a.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether evidence of insubstantial gifts given to a prime contractor's purchasing agent by petitioner with evidence of purchase orders having been awarded by the purchasing agent to petitioner's corporation both before and after these gifts is sufficient to establish the specific intent required by 41 U.S.C. §§ 51 and 54. (Anti-Kickback Act)

2. Whether evidence that petitioner gave insubstantial personal gifts to one purchasing agent and paid by personal check for stock issued to another purchasing agent is sufficient to establish that the gifts or gratuities were made "on behalf of" the corporation of which the petitioner is an officer, as required by 41 U.S.C. § 51.

3. Whether proof that petitioner had knowledge that the purchasing agent's corporation held a negotiated prime contract with the United States is necessary in a prosecution under 41 U.S.C., §§ 51 and 54.

4. Whether occasional gifts of candy, beer, liquor, and cigars given to a purchasing agent of a prime contractor most of which were to be distributed to other employees not involved in the purchasing process constitute "pay-

ments'' of a ''gift or gratuity'' as proscribed by 41 U.S.C., §§ 51 and 54.

5. Whether the district court of indictment and trial in North Carolina had jurisdiction of an offense charged under 41 U.S.C., §§ 51 and 54 concerning a stock transfer which occurred in New York and New Jersey.

6. Whether payment for corporate stock for the accommodation of a purchasing agent constitutes a violation of 41 U.S.C., §§ 51 and 54 where the Government's own witness, the purchasing agent, testified without contradiction that he intended to pay for the stock from the outset and did in fact reimburse petitioner shortly after he received the certificate.

Constitutional Provisions, Statutes Involved

United States Constitution, Article III, Sec. 2.
United States Constitution, Amendment VI.
Rule 18, Federal Rules of Criminal Procedure.
41 U.S.C., § 51.
41 U.S.C., § 52.
41 U.S.C., § 53.
41 U.S.C., § 54.
(Full text in App. B, pp. 1b-3b.)

Statement of the Case

This is a petition to review by *certiorari* a decision and judgment of the United States Court of Appeals for the Fourth Circuit handed down July 18, 1968. The court reversed a conviction of petitioner on a two-count indictment for violation of the Anti-Kickback Act (41 U.S.C., §§ 51 and 54) in the Middle District of North Carolina because of the prejudicial manner in which the U. S. Attorney conducted the trial. and granted petitioner a new trial,

but rejected petitioner's contentions that the evidence on neither count justified submission of the case to the jury, ruling that the motions for judgments of acquittal were properly denied.

Petitioner, an officer of Modern Screw Machine Company (hereinafter referred to as Modern Screw) of Wallington, New Jersey, was indicted in two counts for paying kickbacks to two purchasing agents of Western Electric Co., Inc. (referred to hereafter as Western). The key paragraphs of the indictment are:

> (Count One) 4. That during the years 1961 and 1962, the exact dates to the Grand Jurors unknown, the defendant BERNARD D. GROSSMAN, did knowingly give and cause to be given to Nicholas Sterling Sinhel, an employee and agent of Western, at its Winston-Salem, North Carolina, Plant, approximately two hundred fifty-five pounds of candy, value unknown; cigars, whiskey, and fourteen cases of Foxhead Beer, value unknown, the same being a fee, commission, compensation, gift and gratuity paid on behalf of a subcontractor, namely, Modern Screw, as an inducement for awarding of subcontracts and orders of Western to said subcontractor and as an acknowledgment of subcontracts and orders previously awarded, all in violation of 41 USC 51.
>
> (Count Two) 4. That during the years 1961 and 1962, the exact dates to the Grand Jurors unknown, the defendant, BERNARD D. GROSSMAN, did knowingly give and cause to be given to Walter Roland Clitherow, an employee and agent of Western, at its Winston-Salem, North Carolina, Plant two hundred shares of stock in Developers Small Business Investment Corporation, in the name of Walter Roland Clitherow and paid for by Bernard D. Grossman, in the total

amount of $1,000.00, the same being a fee, commission, compensation, gift and gratuity paid on behalf of a subcontractor, namely, Modern Screw, as an inducement for awarding of subcontracts and orders of Western to said subcontractor and as an acknowledgment of subcontracts and orders previously awarded, all in violation of 41 USC 51.

The Government's Bill of Particulars specified that the cigars and whiskey (Count One) were delivered in person intermittently over the years 1961 and 1962, that the cases of beer were delivered in person during the summer of 1962, that the 255 pounds of candy were delivered in person on November 11, 1962, and that the 200 shares of stock (Count Two) were delivered by means of "personal check to stockbroker." This check was sent from New Jersey to New York.

A number of prime contracts between the Army and Western stipulated as being "negotiated" contracts ("made without formal advertising") were offered into evidence, and several hundreds of purchase orders awarded to Modern Screw were also offered and received in evidence. It was stipulated that petitioner was an officer of Modern Screw during the period in question.

The Government's key witnesses at the trial were the Western purchasing agents Sinhel and Clitherow. Sinhel testified that Modern Screw had been an approved supplier of Western for 25 years and that it performed admirably in supplying Western with precision parts at optimum speed. He stated that he received about 250 pounds of candy from the petitioner around Christmas time which he had distributed throughout the Western plant to various employees. The Foxhead beer, unavailable in the Winston-Salem area, was for a number of Western employees who

had an affinity for that particular brand and Sinhel distributed that also. The cigars were also distributed by Sinhel to various Western employees. Sinhel received the bottles of whiskey at various times from the defendant over the two year period 1961-1962. Sinhel testified that such small gifts were commonly distributed throughout the Western plant by other suppliers. Sinhel testified that the gifts of candy, beer, cigars and whiskey received by him did not induce him to award Modern Screw any purchase orders nor did he consider them an acknowledgment of prior orders and that orders he placed with Modern Screw were so placed because Modern Screw could deliver the precision parts required in the time allotted.

Walter Clitherow, the other purchasing agent, testified that the petitioner told him of certain stock which would be a good investment at $5 per share. Clitherow requested that the petitioner subscribe 200 shares in his name and give his address as his (Clitherow's) mother's address in Averill Park, New York, because both Clitherow and the petitioner thought that the stock could not be sold to a North Carolina resident under laws governing the sale of securities. Acting as instructed by petitioner, Morris Cohon, a New York City stockbroker, sold Clitherow 200 shares and mailed statements to Clitherow's New York address. Clitherow's mother was in California at the time, and therefore did not forward any of his mail to Clitherow in North Carolina. The stockbroker sent two statements to the New York address and made two telephone calls to the petitioner informing him that the stock sent to Clitherow had not been paid for, whereupon the petitioner, in New Jersey, sent the broker, in New York, his personal check in payment for the stock. Then the broker mailed Clitherow's stock certificate to Averill Park, New York. The petitioner told Clitherow not to repay him for the stock until

Clitherow actually received the certificate. Clitherow informed his mother by telephone upon her return from California to forward the certificates to him in North Carolina, which she did. Approximately three weeks after receipt of the certificate by Clitherow in North Carolina, he mailed his check for $1,000.00 to the petitioner by way of repayment. He testified he intended to pay for the stock from the time he and petitioner first discussed it.

The entire stock transaction took place between March, 1962 and July 11, 1962. A cost analysis audit of Modern Screw was begun in August 1961 and continued with a conference at the Western plant, including the petitioner, in April of 1962. However, no investigation of the Western purchasing organization was begun until December, 1962.

The petitioner wishes to emphasize that all of the evidence was offered by Government witnesses. The defendant offered no evidence.

Motions for judgment of acquittal were denied and the jury found the petitioner guilty on both counts and fines and a sentence were imposed. Motions for judgment of acquittal and new trial were denied and the petitioner timely appealed to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit reversed the verdict of the district court and remanded the case for a new trial because of insinuations during the trial by the prosecutor. However, the court further held that the offense involving the stock transaction was committed in the Middle District of North Carolina; that knowledge that the prime contract was negotiated is not an essential element of the offense condemned by 41 U.S.C. §§ 51 and 54; and that the word "payment" in 41 U.S.C. § 54 includes the granting of any gift or gratuity prohibited by 41 U.S.C. § 51. The court failed to rule upon the petitioner's contention that it was incumbent upon the

Government to prove that the alleged gifts were made "on behalf of" Modern Screw and that such proof was conspicuously absent from the record. It also ignored petitioner's contention that proof of the specific intent to induce or acknowledge the award of purchase orders was likewise inadequate.

Petitioner's petition to the court of appeals for rehearing as to the questions of the jurisdiction of the Middle District of North Carolina in this case and of the interpretation of the "on behalf of" language of 41 U.S.C., § 51 was denied, whereupon this petition for *certiorari* was timely filed.

Petitioner concedes that the United States District Court for the Middle District of North Carolina had jurisdiction of the violation of 41 U.S.C., §§ 51 and 54 charged in Count One of the indictment but has consistently maintained that the court had no jurisdiction of the offense charged in Count Two (stock transaction).

Reasons for Granting the Writ

I

This case raises important questions of federal law concerning the meaning of a federal criminal statute of potentially wide application which should be construed by this Court. This Court has never reviewed a criminal prosecution under the Anti-Kickback Act and the Fourth Circuit's opinion establishes substantive law principles which are clearly erroneous and ought to be passed on by this Honorable Court because of the ever increasing scope of Government contract activity.

This Court has only had the civil provisions of the Act before it one time, in *United States* v. *Acme Process Equipment Co.*, 385 U.S. 138 (1966), dealing with the Government's right to cancel a prime contract "tainted" by a

$25,000 kickback, and reversing a Court of Claims decision to the contrary.

The federal Anti-Kickback Act (41 U.S.C. §§ 51-54) was enacted in 1945, applicable only to cost reimbursable contracts, as a measure to prevent the payment of kickbacks in connection with the awarding of Government prime contracts and subcontracts wherein such kickbacks are likely to add to the contract costs. H.R. Rep. No. 212, 79th Cong., 1st Sess. (1945). The Anti-Kickback Act was amended in 1960 to apply only to "negotiated contracts" due to the increased use of this mode of contracting. Negotiated contracts are generally used where the product involved is one not available upon the open market which means that no "going prices" are available for comparison with the contract price, thus rendering such contracts more susceptible to kickbacks. H.R. Rep. No. 1880, 86th Cong., 2nd Sess. (1960).

The award and performance of negotiated Government contracts presently involve extremely large numbers of businesses and individuals as well as an extremely large flow of public funds. "The departments and agencies of the government are awarding contracts at the current rate of about fifty billion dollars a year to procure property and services for use in their programs and activities. The Department of Defense alone is awarding contracts for weapon systems and related equipment and supplies at the rate of over thirty-five billion dollars annually. On the basis of the best available information, we estimate that as much as 80 to 90 per cent of the dollar value of procurement by contract is made by negotiated contracts." *Comptroller General of the United States, Annual Report,* fiscal 1967, page 103. Many of these negotiated contracts, especially defense contracts, are placed with such corporate giants as General Electric Corporation, General Dynamics Corp., American Telephone & Telegraph, Inc., General Motors, and Ling-

Temco-Vought, Inc., *Congressional Quarterly*, May 24, 1968, pgs. 1162-1163. It is apparent that these giant corporations and their various subsidiaries along with all the other large and small Government contractors have points of operation all over the United States and deal with literally thousands of suppliers. In turn, each of these contracts involves many individual transactions which are susceptible to the payment of kickbacks.

Furthermore, the potential application of the Anti-Kickback Act is accentuated by the prevalence in the business world of the practice of "corporate gift giving." A survey conducted by a marketing trade journal during 1967, while its statistical validity may be debated, at the very minimum gives a good indication of the prevailing attitude toward "business gifts." According to that survey, 72 per cent of the businesses contacted gave business gifts. Most of these gifts ranged up to $25 in value with 71 per cent of the individual gifts of less than $10 in value. Forty-six per cent of those firms giving gifts did so for "goodwill" while 54 per cent did so for "appreciation." Such gifts are "kept large enough to say thank you, but small enough not to obligate." *Sales Management*, 99:40, Sept. 10, 1967, pgs. 40-42. Are such gifts, if made by or on behalf of a subcontractor under a prime Government negotiated contract, to be treated as federal criminal offenses under 41 U.S.C. § 54? The Court of Appeals for the Fourth Circuit has ruled in the case at bar that the giving of such gifts as beer, cigars, whiskey and candy does constitute a felony punishable by fine and imprisonment.

Therefore, the need for clear guidelines as to the proper application of the "Anti-Kickback Act", is apparent. Indeed, the Federal Government itself has seen fit to furnish its employees with certain rules as to what gifts they may or may not accept. Federal agency heads are authorized to

permit their employees to accept minor gifts even from persons who regularly have matters within the jurisdiction of their agency. Title 5 *C. F.R.* § 735.202 provides that federal employees are expressly permitted to accept food and refreshments of a nominal value even when on an inspection tour and unsolicited advertising or promotional materials such as pens, pencils, calendars, etc. Without the construction of the Anti-Kickback Act so as to provide such rules of thumb for private business men, the most scrupulous member of the business community may find himself in federal court as a result of giving relatively insubstantial gifts, in accordance wtih business practice, to some employee of a Government contractor. The petitioner's situation is a perfect case in point. Petitioner gave one purchasing agent some small gifts and used him as a conduit for distribution of other small gifts to Western employees who were not involved in the purchasing process. Petitioner gave a stock "tip" to another purchasing agent whom he had known for years and helped him follow through on it. These activities would scarcely lift an eyebrow in the business community, and would normally be viewed as gestures of friendship, yet the petitioner now stands convicted of a federal crime based on them.

In 1958, the United States Department of Justice had this to say about 41 U.S.C. §§ 51 and 54: "The Statute being novel, interpretation of its scope has been rendered most difficult by lack of either judicial authority or guideposts in the legislative history." H. R. Rep. No. 1880, supra. Because the criminal provisions of the Anti-Kickback Act have been interpreted only meagerly to date, it would appear that the foregoing appraisal remains valid. Indeed, a distinguished circuit court judge has commented upon the uncertainty of the law surrounding 41 U.S.C. §§ 51 and 54 and has stated that the courts "should explore in greater depth

the provisions of the Anti-Kickback Act, their meaning, and their application . . ." (Circuit Judge Ely concurring and dissenting in *Moore* v. *United States,* 347 F. 2d 942 (9 Cir. 1965).

Therefore, we respectfully submit, the questions raised in the instant case of great importance to the bench, bar, and the business community which ought to be reviewed by this Honorable Court include the following:

(a) Did Congress intend to condemn giving trivial gifts of insubstantial or unknown value (such as cigars, an occasional bottle of whiskey, or candy) over a period of two years *as a felony,* where there is no connection and no attempt to connect any of these items to any subcontract or purchase order? The criminal provision of 41 U.S.C. § 54, referring back to 41 U.S.C. § 51 (the "civil" provision), specifies that knowingly making or receiving any such prohibited *payment* shall constitute a felony, while the civil provision (41 U.S.C. § 51) proscribes the "payment of any fee, commission or compensation of any kind *or* the granting of any gift or gratuity." (emphasis supplied) Admittedly, a gift of substantial value, or one connected or related to a subcontract or purchase order in point of time or by way of value (as a percentage commission or fee), could constitute a *payment.* But can a cigar, or bottle of whiskey, or candy for everyone in the plant at Christmas, or 14 cases of beer to a group of employees, constitute the payment of a *kickback* where these gifts are alleged to be of "value unknown," are not connected to any purchase order or group of purchase orders, and are not considered by the Government's witness (the purchasing agent) to have been an inducement for the award of purchase orders or an acknowledgment of purchase orders already awarded? Where is the line to be drawn? Would picking up the tab at lunch or giving a package of cigarettes subject an honest businessman to prosecu-

tion and conviction for *felony*, simply because the luncheon guest or recipient of the cigarettes is an employee of a Government contractor?

(b) If the only requirement of guilty knowledge is that the defendant know he is giving a gift to an employee of a Government prime contractor, and that he gives the gift with the intent of inducing or acknowledging purchase orders, (all being elements required by the civil provision giving the Government the right to sue and recover the value of the gifts), has not the requirement of knowledge in the criminal provision been rendered surplusage, of no meaning? The criminal provision (41 U.S.C. § 54) specifies that "any person who shall *knowingly*, directly or indirectly, make or receive any such prohibited payment . . ." Only *negotiated* prime contracts ("made without formal advertising" 41 U.S.C. § 52) are covered by the Anti-Kickback Act. *Morisette* v. *United States*, 342 U.S. 246, 271 (1952) indicates that an accused must have "knowledge of the facts—if not the law—which make his conduct criminal." Unless the prime contract is negotiated, there can be neither *civil nor criminal* violations of the Act. An accused could not consciously give a gift to an employee of a Government contractor for the purpose of inducing or acknowledging the award of a purchase order without *knowing* that he was doing so. Yet, the Fourth Circit has ruled that the word "knowingly" in the criminal statute means nothing more than this, rendering it complete surplusage, and attributing to Congress the foolish intention of inserting a meaningless word in a criminal statute, a word which normally is freighted with meaning. 21 Am. Jur. 2d. *Criminal Law* § 88.

(c) Where trivial gifts are given or a stock purchase accommodation is made for employees of a prime contractor which regularly awards purchase orders to petitioner's sub-

contractor and has done so for decades, and no attempt is made to connect the gifts or stock purchase accommodation to any purchase order or group of purchase orders in point of time, by value or in any other way, can the specific felonious intent to induce the award of future orders or to acknowledge the award of past orders simply be inferred beyond a reasonable doubt from the fact the gifts were given and the orders had been awarded?

In *Howard* v. *United States*, 345 F. 2d 126 (1 Cir. 1965), the First Circuit Court of Appeals held that the intent requirement of the Federal Anti-Kickback Act called for proof by the government that the gift was given with knowledge that its purpose was "as an inducement for the award of subcontracts or orders" under a prime negotiated Government contract. In the case at bar, the Fourth Circuit Court of Appeals held that the presence of the word "knowingly" in Section 54 requires that the Government prove that "defendant knew that he was making a payment in order to induce the contract to be awarded to Modern Screw." These statements of the intent requirement of 41 U.S.C. § 51 and 54 are wholly reasonable interpretations of the language of the Act so far as they go. The petitioner respectfully submits that 41 U.S.C. § 51 should be properly interpreted in terms of its requirement that there be a specific intent to induce or acknowledge the award of purchase orders so as to have no application to small insubstantial gifts given to employees of Government contractors.

The offense condemned by the Anti-Kickback Act has been properly analogized to the offense of bribery as set out in 18 U.S.C., §§ 201, *et seq.* *Howard* v. *United States*, *supra.* The general rule is that a bribe must involve something of value with sufficiency of value being determined by the application of a subjective test which is necessarily a part of the test for intent. The requirement of value is satisfied if the jury can reasonably infer that the defendant

considered his bribe offer of sufficient value to accomplish his purpose. 12 Am. Jur. 2d *Bribery* § 7; *Commonwealth* v. *Hayes,* 311 Mass. 21, 40 NE 2d 27 (1942). The petitioner submits that, as a matter of law, no reasonable person would make small gifts of candy, beer, cigars or liquor expecting thereby to induce or acknowledge the award of multi-thousand dollar contracts. No businessman would believe such gifts sufficient to influence the granting of such a contract. In fact, the evidence in petitioner's case tends to negative the existence of such intent, as Modern Screw had been an approved supplier of Western's for years and apparently the engineering department often expected Sinhel to buy from Modern Screw. Therefore, there was no apparent need to bribe the purchasing agents.

Petitioner is keenly aware that it is not the province of this Court to weigh testimony; however, the petitioner respectfully points out that this Court has in the past ruled upon whether there exists in the record of a case such "substantial evidence . . . which, if believed by the jury, would justify the submission of the issues to it," which sufficiency of evidence is necessary to support the judgment of the trial court. *Stilson* v. *United States,* 250 U.S. 583 (1919). "Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *NLRB* v. *Columbian Enamelling & Stamping Co.,* 306 U.S. 292 (1939), cited in *United States* v. *United States Gypsum Co.,* 67 F. Supp. 397. This Court has also ruled that a complete lack of evidence of guilt on a criminal prosecution raises serious due process questions. *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960).

(d) If a trivial gift is given or a stock purchase accommodation is made as a personal matter between business acqaintances and there is no evidence that the cost of the

gifts is borne by the corporate subcontractor, can these things be said to have been accomplished "on behalf of" the corporate subcontractor?

Section 51 of the Anti-Kickback Act prohibits payment of compensation or gratuities of any kind, directly or indirectly, *by or on behalf of* a subcontractor to any agent or employee of a prime contractor for the purpose of inducing or acknowledging the award of a subcontract. 41 U.S.C. § 53 gives the General Accounting Office the power to inspect the records of any prime contractor or subcontractor for the purpose of ascertaining whether such prohibited payments have been paid or granted by a subcontractor. Section 54 makes it a federal crime to knowingly receive or grant any such prohibited payments. In the case at bar, petitioner was charged in both counts of the indictment with making such prohibited payments "on behalf of a subcontractor, namely, Modern Screw." However, no evidence whatsoever appears in the record to show that the gifts charged by the indictment were anything other than *personal* gifts of the petitioner made on his own behalf and paid for by him. There is no evidence in the record connecting the subcontractor, Modern Screw with the making of the alleged payments or with ultimately bearing the expense.

The decision of the Ninth Circuit in *Moore* v. *United States, supra,* highlights the requirement that prohibited payments under 41 U.S.C. § 51 be made either "by" or "on behalf of" the subcontractor.

No proof that the alleged payments were made on behalf of Modern Screw appears in the record here despite the fact that the General Accounting Office had full power under 41 U.S.C., § 53 to examine the records of Modern Screw to determine whether the alleged payments were in fact made on behalf of Modern Screw.

Petitioner respectfully submits that by failing to rule on the petitioner's contentions as to the "on behalf of" requirement of 41 U.S.C. § 51, as set forth by the Ninth Circuit Court of Appeals, the court below has fully sanctioned the application of a criminal penalty to the petitioner under the terms of a federal statutory provision without requiring the Government to prove all elements of the statutory crime created thereby. This amounts to a repudiation of the decision in *Moore* v. *United States, supra,* which specifically recognizes that required element. Furthermore, lack of evidence in a criminal prosecution raises due process questions. *Thompson* v. *City of Louisville, supra.*

II

This Honorable Court should grant *certiorari* in the exercise of its supervisory powers over the federal courts to prevent manifest injustice, namely, prosecution and punishment of petitioner by a court without jurisdiction of the offense charged.

The Fourth Circuit and the district court in this case have completely ignored the time-honored and well-established rule that a bill of particulars binds and limits the prosecution to what is alleged therein. *United States* v. *Haskins,* 345 F. 2d 111, 114 (6 Cir. 1965); *United States* v. *Glaze,* 313 F. 2d 757, 759 (2 Cir. 1963); *Land* v. *United States,* 177 F. 2d 346, 348, 349 (4 Cir. 1949) 27 Am. Jur. *Indictments and Information* § 112. This goes to the constitutional right of the accused to be informed of the charge against him and he certainly may rely upon the averments of the bill. Here, the Government specified in its bill that the "manner of delivery of the gift" of stock to Clitherow was "personal check to stockbroker." The proof showed without contradiction that this check went from New Jersey to New York. Hence, the alleged kickback payment could not possibly

have occurred within the Middle District of North Carolina! Yet the Fourth Circuit does not even refer to this contention of petitioner in its opinion.

The court below, instead, ruled that the offense charged in Count Two of petitioner's indictment (the stock transaction) occurred in the Middle District of North Carolina, the domicile of the purchasing agent who was the transferee of the stock. The petitioner respectfully submits that this ruling is erroneous and thus deprives the petitioner of his right to have the offense tried in that district in which it occurred as guaranteed by the Constitution. *U. S. Const.* art. III, § 2; U. S. Const. amend. VI. The Court below, citing no authority, based its decision as to this question upon the purported nature of stock as intangible personal property, the situs of which, as assumed by the law, is the state of residence of the owner or transferee of the stock.

While as a general rule intangible personal property is considered under the law to have its situs in the state of its owner's domicile, this is not true as to intangible personal property which by law and commercial usage is normally considered to be embodied in tangible form (i.e., stock certificates). 16 Am. Jur. 2d *Conflict of Laws* § 35. Stock certificates are normally considered to constitute in tangible form the shares of stock they represent. *Direction der Disconto-Gesellschaft* v. *U. S. Steel Corp.*, 267 U. S. 22 (1925). This rule has special significance in light of the fact that both states which had "contact" with the stock transfer here in question operated at the date of that transfer in 1962 under the Uniform Stock Transfer Act. *Uniform Stock Transfer Law, N. J. S. A.* 14:8-23, et seq. and *N.Y. Personal Property Law* § 162 et seq. (McKinney 1962) New Jersey was the state in which the corporation issuing the stock was domiciled, and New York was the state in which the brokerage transaction took place. The general rule that questions relating to the title and transfer of corporate stock

are to be governed by the law of the corporation's domicile is also applicable in jurisdictions in which the Uniform Stock Transfer Act has been adopted. The minority rule is that the law of the jurisdiction of transfer governs. See Annot., 131 A.L.R. 192 (1941). In any event, both of the jurisdictions involved in the case at bar were governed by the provisions of the Uniform Stock Transfer Act in 1962.

The Uniform Stock Transfer Act makes *delivery* of stock *certificates* an indispensable element of transfer of title to shares of stock and specifically excludes transfer upon the books of the corporation as a necessary element to transfer of legal title. *Manna* v. *Pirozzi,* 44 N. J. Super. 227, 130 A. 2d 55 (1957); *Parker* v. *Colonial Bldg. & Loan Ass'n,* 111 N. J. Eq. 49, 161 A. 353 (1932). This delivery requirement has been accorded special meaning where the stock transferred is subject to a *gift,* as is here charged in the indictment. *Parker* v. *Colonial Bldg. & Loan Ass'n, supra.* Transfer of legal title to stock under the Uniform Act *cannot* be accomplished by mere transfer thereof on the corporate books. *Fidelity Trust Company v. Newark Milk and Cream Co.,* 89 N. J. Eq. 224, 108 A. 54 (1918). Delivery, and thus transfer, can be accomplished to the donee's agent acting on the donee's behalf. *Parker* v. *Colonial Building & Loan Ass'n, supra.*

In the case at bar, both the transferee's mother, whom he instructed to forward the certificates, and the broker, who acted under the law in his behalf in acquiring the shares, were his agents for purposes of delivery of the shares. Both acted for him in the State of New York. The opinion of the court below (infra, App. A, pp. 1a-8a) states that they were Clitherow's agents! Once any of these parties accepted the duly registered certificates to be transmitted to the transferee, delivery and transfer of legal title to the shares were complete. Acceptance of the certificates by both of these agents of the transferee took place in New

York. The certificate and, therefore, the shares themselves, were located in New York when the transfer occurred. The legal right of the transferee to the stock was wholly perfected in New York; therefore, it can only be concluded that the alleged payment or granting of the gift of stock was completed in New York. The Government has long contended that the offense here was complete when the transfer was complete. The petitioner submits that the "actual transfer of the money (here, stock) at the time and place where it occurs, accompanied by the unlawful intent," as required by *Krogmann* v. *United States,* 225 F. 2d 220 (6 Cir. 1955) to establish the location of the analogous offense of bribery, was complete and accepted by the transferee through his agents in New York. Since the completed transfer and, therefore, the offense occurred in the State of New York, the offense charged in Count Two of the indictment should properly have been tried in the federal courts of New York, which, under the Constitution, were the only courts with jurisdiction.

Conclusion

The decision finally reached by this Court in the case at bar will have consequences reaching throughout the American business community because of significant part which the United States Government plays in the economic life of the nation. If *certiorari* is granted, the guideposts set up by this Court will be anxiously awaited by the businessmen who deal with the federal government by means of the contracting process as well as by the bench and bar who must resolve the civil and criminal disputes which arise out of this contracting process. Petitioner's case indeed represents an ideal opportunity for this court to interpret the statute which was intended by Congress to set ethical bounds around contractual dealings between the Government and

contractors in a primarily private sector of the economy. The court below has clearly disregarded the intended purpose of the Federal Anti-Kickback Act by applying it to relatively insubstantial gifts, and by ignoring the requirement expressly contained within the statute and alleged in the indictment that a gratuity be given on behalf of the subcontractor. Furthermore, the lower court has sanctioned the Middle District Court of North Carolina in exceeding the proper bounds of its jurisdiction under the United States Constitution and has read the requirement of guilty knowledge out of 41 U. S. C. § 54. Though the court below has reversed the conviction of the petitioner and remanded the case at bar for a new trial on other grounds, it has in so doing remitted a mandate to the trial court as to the questions above discussed which will be binding upon the petitioner as the law of the case upon retrial and which will deprive the petitioner of his right to a trial free from substantial error.

It is, therefore, respectfully submitted that this petition for writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit should be granted.

NEWSOM, GRAHAM, STRAYHORN & HEDRICK
By RALPH N. STRAYHORN
By E. C. BRYSON, JR.

HATFIELD, ALLMAN & HALL
By ROY G. HALL, JR.
Attorneys for Petitioner, Bernard D. Grossman

Filed Jul. 18, 1968, Samuel W. Phillips, Clerk

APPENDIX A—Opinion and Orders

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,959

UNITED STATES OF AMERICA, *Appellee,*

versus

BERNARD D. GROSSMAN, *Apellant.*

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Edwin M. Stanley, Chief Judge.

(Argued March 8, 1968. Decided July 18, 1968.)

Before HAYNSWORTH, Chief Judge, WINTER, Circuit Judge, and MERHIGE, District Judge.

OPINION BELOW

Roy G. Hall, Jr. and Ralph N. Strayhorn (E. C. Bryson, Jr. and Newsom, Graham, Strayhorn & Hedrick; and Hatfield, Allman & Hall on brief) for Appellant, and William H. Murdock, United States Attorney (Richard M. Dailey, Jr., Assistant United States Attorney, on brief) for Appellee.

WINTER, Circuit Judge:

Convicted under two counts of an indictment charging violations of the "Anti-Kickback" Act, 41 U.S.C. §§ 51, 54 [1] and sentenced to concurrent terms of three months,

[1] The pertinent provisions of 41 U.S.C. are as follows:

"§ 51. Fees or kick-backs by subcontractors on negotiated contracts; recovery by United States; conclusive presumptions; withholding of payments

The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime

and fined $2,500, on each count, defendant appeals, assigning numerous grounds for reversal. We reverse defendant's conviction and award him a new trial, because of prejudicial argument by the prosecutor. In so doing we notice only those of defendant's other grounds of appeal as might constitute a bar to retrial.

In count one of the indictment, defendant, an officer of Modern Screw Machine Company, Inc., of Wallington, New Jersey, was charged with having given to Nicholas Sterling Sinhel, an employee of Western Electric Company, 255 pounds of candy, cigars, whiskey and 14 cases of beer, a "fee, commission, compensation, gift and gratuity" as an inducement to Western's award of subcontracts and orders to Modern Screw in violation of the statute. In count two, defendant was charged with having given to Western's employee Walter Roland Clitherow 200 shares of stock in Developers Small Business Investment Corporation, of a value of $1,000, for the same purpose.

The proof adduced at trial showed that Western had a number of prime negotiated contracts with the Department of the Army, many of which were for research and development of the Nike missile defense system. Sinhel and Clitherow were, respectively, an assistant buyer and buyer of Western. Sinhel had authority to make purchases up to $2,000, and Clitherow had authority to make purchases

---

contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontact or order previously awarded, is prohibited. * * *"

* * * * *

"§ 54. Same; penalties

Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both."

up to $15,000. Modern Screw was a subcontractor to Western, filling purchase orders for parts and equipment used by Western in performing its army contracts. Modern Screw did practically all of its business with Western, and Sinhel and Clitherow placed over 95% of Western's business with Modern Screw. Defendant had been doing business with Western for as long as 25 years. He was so familiar with Western's future needs that he maintained an inventory, valued in excess of $500,000, of parts ordered by Western.

During 1961 and 1962, when Sinhel was placing purchase orders with defendant under Western's prime negotiated contracts, defendant, from time to time, gave Sinhel quantities of candy, cigars, beer and liquor. Sinhel, who stated that he also received gifts from other suppliers, admitted that such gifts caused him to favor them in the award of purchase orders or subcontracts. The gift of stock was made to Clitherow early in 1962 by defendant's arranging for his New York broker to mail the stock certificates to Clitherow at the home of his mother, in NewYork, who forwarded them to Clitherow in Winston-Salem, North Carolina. Defendant paid for the stock in March, 1962. In approximately July, 1962, Clitherow sent defendant a check for $1,000; but this was several months after Clitherow and defendant became aware that an investigation of Modern Screw's prices had been made, and that Modern Screw was found to be making a profit of 35%-45% on its business with Western.

Without detailing all of the evidence contained in the record, we are satisfied from our review of it that in general there was a substantial evidentiary basis from which the jury could find defendant's guilt beyond a reasonable doubt. We find no error in the instructions or evidentiary rulings. We turn, then, to the more important grounds of attack.

First, defendant contends that, with regard to the stock purchased by Clitherow, defendant could not be guilty of a crime committed in the Middle District of North Carolina because the certificates for the shares were delivered in New York, either by delivery by the seller of his endorsed

certificates to the broker acting for defendant and Clitherow, or by delivery of new certificates by the broker or the issuer to Clitherow's mother. The effect of delivery, so the argument runs, vested title in Clitherow and, hence, "payment" proscribed by 41 U.S.C. §§ 51 and 54 occurred in New York. Delivery in this place, it is claimed, thus bars prosecution in the Middle District of North Carolina.

Defendant is, of course, correct in asserting the jurisdictional imperative that an offense be committed within the state and district of indictment,[2] but defendant's argument in stressing the original place of delivery of the certificates and defendant's lack of control over ultimate delivery is erected upon a faulty premise. Ownership of stock in a corporation is ownership of a species of intangible personal property and, by accepted rules, intangible personal property acquires a situs in the place of domicile of the owner. Actual delivery of the certificates to Clitherow in North Carolina was merely delivery of evidence of ownership and evidence that the transfer was made. This is so because Clitherow was not an unwilling donee who declined to accept the gift, or to accept the certificates when they were forwarded to him. Moreover, the broker, in accepting delivery of the seller's certificates in New York, was acting for Clitherow. The evidence shows that Clitherow's mother, who was away when delivery was made to her, forwarded the certificates to her son at his request, so that it follows that she, too, was acting for Clitherow in accepting the certificates. There can be no question but that the intention of the parties was to vest ownership of the shares in Clitherow, and to place the new certificates therefor in his hands, at a time when he was domiciled and was physically present in the Middle District of North Carolina, where the prosecution was laid, and that the delivery to the broker and the delivery to Clitherow's mother, followed by delivery by her to Clitherow, were but steps in

---

[2] U. S. Constitution, Art. III, § 2, cl. 3; U. S. Constitution, Amend. VI; Rule 18, *F. R. Crim. Pro.*; see also, *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U. S. 240, 245 (1964); *United States* v. *Cores*, 356 U. S. 405, 407 (1958).

a continuing transaction. Because the whole purpose of the transaction was to vest ownership of the stock in Clitherow in Winston Salem, in the Middle District of North Carolina, and to place the stock certificates in his physical possession in that state and since that overall purpose was accomplished, we think that "payment" proscribed by the statute was made in the Middle District of North Carolina and that the nice questions of jurisdiction and venue do not then depend upon technical considerations of the exact time and place that title passed to Clitherow.

Nor do we find merit in the argument that defendant was improperly convicted because proof was lacking that defendant knew that Western's contracts were "negotiated contracts" so as to render 41 U.S.C. §§ 51 and 54 applicable. The short answer to the contention is that other circuits have held that knowledge of the terms of the prime contract is not an essential element of the statutory crime, and with them we are in accord. *Hanis* v. *United States*, 246 F. 2d 781 (8 Cir. 1957); *United States* v. *Barnard*, 255 F. 2d 583 (10 Cir. 1958). See also, *Howard* v. *United States*, 345 F. 2d 126, 129 (1 Cir. 1965). The use of "knowingly" in § 54 as modifying the phrase "make or receive any such prohibited payment" requires only, insofar as is pertinent to defendant, that defendant knew that he was making a payment in order to induce a contract to be awarded to Modern Screw. The proof overwhelmingly supports an affirmative conclusion in this regard.

We are not persuaded by defendant's argument that § 54 was not shown to have been violated because property, as distinguished from money, was what passed from defendant to Sinhel and Clitherow. It is true that § 51 prohibits the "*payment* of any fee, commission, or compensation of any kind *or* the *granting* of any gift or gratuity of any kind," (emphasis supplied) to induce the award of a subcontract or as an acknowledgment of a subcontract previously awarded, but that § 54 which provides the criminal sanction purportedly applies only to persons who make or receive "any such prohibited *payment*" (emphasis supplied). No good reason is apparent why Congress should

outlaw the payment of money or the granting of a gift for the prohibited purposes, but yet provide a criminal penalty only for the payment of money.[3] To read § 54 thus would be unduly to frustrate the general purpose of the Act. The gift of property may be as great, or even greater, an inducement for an illegal purpose as the payment of money. Section 54 need not be read as restrictively as defendant asserts. "Payment" in § 54—particularly "*such* prohibited payment"—may be read as referring to any kind of transfer proscribed by § 5. We think that § 54 should be so read. This construction is one which has been assumed by previous decisions. *United States* v. *Barnard, supra; Howard* v. *United States, supra.*

Nevertheless, the judgments must be reversed and a new trial granted by reason of the following:

Sinhel, the person to whom defendant was charged with improperly having given candy, cigars, whiskey and beer, was a witness for the government. On redirect examination and over repeated objection, the prosecutor was permitted to ask Sinhel if he had made certain *cash* deposits to his bank account during 1961 and 1962 and whether these deposits amounted to "many thousands of dollars." Sinhel denied that the deposits amounted to this *much*, and he was unable to remember various deposits of $50 to $500 on various dates about which he was interrogated. After inquiry about four specific deposits, the trial judge sustained the objection and the inquiry took a different course. Although objection was sustained, the prosecutor, on direct examination, asked Sinhel if he had pleaded guilty to receiving gifts from suppliers in 1961 and 1962 and whether he had been charged with accepting gifts from suppliers.[4]

---

[3] The "Anti-Kickback" Act was first enacted in 1946. 60 Stat. 37. As originally enacted it applied only to contracts "on a cost-plus-a-fixed fee or other cost reimbursable basis." As negotiated contracts thereafter became increasingly the rule, the Act was amended in 1960 (Pub. L. 86-695; 74 Stat. 740) to broaden its scope. See, 1960 U. S. Code Cong. and Adm. News, p. 3292. The legislative history is otherwise unenlightening on the problem at hand.

[4] The district judge, at the time the questions were asked, cautioned the jury not to consider the questions or what the answer would have been.

Against this background, the prosecutor, in his closing argument to the jury stated that the court would charge that before the jury could return a verdict of guilty it must find that any gift or gratuity was given for the purpose of inducing the award of a contract or a purchase order, or an acknowledgment of one that had been awarded. The prosecutor argued that he did not know why the defendant made gifts to Sinhel, and stated:

> "• • • Can you think of any reason under the sun why Mr. Grossman would be spending hundreds and hundreds of dollars to buy this beer, candy, and other stuff, and giving it to employees of Western Electric, if it wasn't as an acknowledgement [sic] of something that they had done for him or something to induce them to give him something in the future? *Does he look like that kind of man? Does he look like a philanthropist to you? You have a right to look at him.* What other reason would he have for it? What effect did it have on these people?" (emphasis supplied)

In connection with this argument, it should be noted that the defendant did not testify in his own behalf.

The prosecutor then adverted to Sinhel's testimony that he probably favored persons from whom he received gifts and favors in awarding contracts for business. The prosecutor stated that it was for this purpose that the Act was passed, and added:

> "• • • I don't know; you know, the beer and the candy and the other stuff that was testified about here kind of *reminds me of an iceberg; Mr. Strayhorn [defendant's counsel] would lead you to believe it was just a little block of ice floating down, but to me it's just the tip of a big iceberg.* You know why I say that? It's hard for me to believe that Mr. Sinhel or anybody else could be influenced by this alone. • • • I don't believe that Sinhel could be bought for as little as we have

---

In his instructions, the district judge instructed the jury generally to disregard any question to which an objection was lodged, where the objection was sustained, and not to speculate what the witness would have answered if permitted to do so.

been able to show that he received here. * * *" (emphasis supplied)

We would have a serious doubt about the propriety of the prosecutor's interrogating Sinhel if he had pleaded guilty to a violation of the Act if, as represented to us by defendant's counsel in argument, the prosecutor knew that Sinhel had pleaded not guilty, and we would have serious doubt about the propriety, in the absence of surprise or a showing of hostility on the part of Sinhel, of the prosecutor's apparent disavowal of Sinhel as a government witness and his attempt to interrogate him on specific cash deposits, but we need not decide these questions, especially in view of the cautionary instructions as to the former. Nor need we decide the propriety of the prosecutor's inviting the jury to look at the defendant, when the defendant had not testified, so that the argument must be construed to be one inviting a determinaion of guilt or innocence on facial characteristics and not an argument to judge the credibility of a witness in part by his demeanor and manner of testifying. It is sufficient that the former provided the setting for implanting in the minds of the jury the notion that Sinhel had engaged in other related crimes and making that notion explicit with regard to defendant by the "tip of the iceberg" argument.

In short, the prosecutor insinuated that Sinhel had been given many gifts and gratuities for an illegal purpose, probably from defendant, beyond those for which defendant was charged and beyond those for which proof was offered at the trial. The prejudice to a defendant of inviting conviction on facts—if they be such—dehors the record is counter to the basic concept of fairness. From the representative of the United States, a sovereign whose duty it is to govern impartially, and a person in whom the average jury has confidence that he will faithfully observe his trust, the thrust of the statements, in the context made, destroyed fairness and equal justice. Reversible error clearly occurred. *Berger* v. *United States*, 295 U.S. 78 (1935); *Dunn* v. *United States*, 307 F. 2d 883 (5 Cir. 1962); *United States* v. *Bugros*, 304 F. 2d 177 (2 Cir. 1962); *United States* v. *Tucker*, 267 F. 2d 212 (3 Cir. 1959).

REVERSED and REMANDED.

Filed Aug. 30, 1968, Samuel W. Phillips, Clerk

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,959

UNITED STATES OF AMERICA, *Appellee,*

vesus

BERNARD D. GROSSMAN, *Appellant.*

ORDER

Appellant's petition for rehearing having been read and considered, it is, ORDERED,

1. That said petition be, and it is hereby, denied.
2. That the typewritten opinion heretofore filed be, and it is hereby, amended by striking all of the full paragraph beginning on page 5 and ending on page 6 (except footnote 2), and substituting in lieu thereof the two paragraphs set forth on the two sheets attached hereto.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge.

HARRISON L. WINTER
United States Circuit Judge.

ROBERT R. MERHIGE, JR.
United States District Judge.

A True Copy, Teste:

SAMUEL W. PHILLIPS, *Clerk.*
By MARGARET B. ATKINS,
Deputy Clerk.

Filed Sep. 9, 1968, Samuel W. Phillips, Clerk

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,959

UNITED STATES OF AMERICA, *Appellee,*

vs.

BERNARD D. GROSSMAN, *Appellant.*

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.

Upon the motion of the appellant, by his counsel, and for cause shown,

It is ordered that the mandate in the above case be, and is hereby, stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed within the time permitted by law.

a/CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit.

A True Copy, Teste:

SAMUEL W. PHILLIPS, *Clerk,*
By MARGARET M. WALTON,
Deputy Clerk.

APPENDIX B—Constitution and Statutes Involved

United States Constitution, art. III, §2 :

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

United States Constitution, amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistant of Counsel for his defence."

Rule 18, Federal Rules of Criminal Procedure:

> "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses. As amended Feb. 28, 1966, eff. July 1, 1966."

41 U.S.C., § 51:

> "The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by, or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind

whatsoever; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or higher tier subcontractor. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff of moneys otherwise owing to the subcontractor either directly by the United States, or by a prime contractor under any contract or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor. Mar. 8, 1946, c. 80, § 1, 60 Stat. 37; Sept. 2, 1960, Pub. L. 86-695, 74 Stat. 740."

41, U.S.C., § 52:

"For the purpose of sections 51-54 of this title, the term 'subcontractor' is defined as any person, including a corporation, partnership, or business association of any kind, who holds an agreement or purchase order to perform all or any part of the work or to make or to furnish any article or service required for the performance of a negotiated contract or of a subcontract entered into thereunder; the term 'person' shall include any subcontractor, corporation, association, trust, joint-stock company, partnership, or individual; and the term 'negotiated contract' means made without formal advertising. March 8, 1946, c. 80, Sec. 2, 60 Stat. 38; Sept. 2, 1960, Pub. L. 86-695, 74 Stat. 740."

41, U.S.C., § 53:

"For the purpose of ascertaining whether such fees, commissions, compensation, gifts, or gratuities have been paid or granted by a subcontractor, the General Accounting Office shall have the power to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a negotiated contract. Mar. 8, 1946, c. 80, Sec. 3, 60 Stat. 38; Sept. 2, 1960, Pub. L. 86-695, 74 Stat. 741."

41, U.S.C., §54:

"Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both. Mar. 8, 1946, c. 80, Sec. 4, 60 Stat. 38; Sept. 2, 1960, Pub. L. 86-695, 74 Stat. 741."

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 25 1968
CLERK

No. 861

In the Supreme Court of the United States

OCTOBER TERM, 1968

BERNARD D. GROSSMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

JEROME M. FEIT,
MARSHALL TAMOR GOLDING,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 581

BERNARD D. GROSSMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted, after trial by jury in the Middle District of North Carolina, of two counts charging him with violating the Anti-Kickback Act (41 U.S.C. 51, 54) by giving gifts and gratuities to agents of a prime contractor with the United States as an inducement for future, and an acknowledgment of past, awards of subcontracts and orders to the company of which he was an officer. The court of appeals reversed his conviction and remanded for a

new trial because of prejudicial argument by the prosecutor (Pet. App. 6a-8a). It rejected, however, contentions that petitioner was entitled to a judgment of acquittal as a matter of law (Pet. App. 2a-6a).

Since the court of appeals has ordered a new trial, petitioner's questions regarding the scope of the Anti-Kickback Act are premature. Even if these questions were deemed sufficiently important to merit consideration by this Court, they should not be considered in the absence of particular evidence supporting an outstanding conviction, the validity of which depends upon their resolution. Similarly, petitioner's challenge to the court's venue over the count of the indictment alleging a gift of stock presents no question of general importance warranting immediate review, and may be mooted by the new trial which has been ordered. The gift made was not, as petitioner seems to assume, the check for $1000 which he undoubtedly delivered to a stockbroker in New York, but the shares of stock purchased with that check, which quickly found their way to North Carolina as a jury could readily believe they were intended to. Given the intangible nature of this gift, it was reasonable for the government to state in its bill of particulars that it had been delivered by "personal check to stockbroker," as this was the act of petitioner which started the shares on their way.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

JEROME M. FEIT,
MARSHALL TAMOR GOLDING,
Attorneys.

OCTOBER 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 323241 271